

D.T.E. 01-31-Phase I

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts

INTERLOCUTORY ORDER ON VERIZON'S MOTION TO STRIKE, OR IN THE
ALTERNATIVE, TO SUPPLEMENT SURREBUTTAL

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INTERLOCUTORY ORDER ON VERIZON'S MOTION TO STRIKE, OR IN THE
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I. INTRODUCTION

On November 14, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon" or "VZ") filed a Motion to Strike, or, in the Alternative, to Supplement Surrebuttal Testimony ("VZ Motion to Strike") in response to the November 1, 2001 pre-filed surrebuttal testimony of AT&T Communications of New England, Inc. ("AT&T"). On November 21, 2001, AT&T filed an opposition to VZ's Motion to Strike ("AT&T Opposition"). No other party filed a response to VZ's Motion to Strike. On November 30, 2001, the hearing officer requested that Verizon supplement its Motion to Strike by indicating, by page and line number, the exact portions of AT&T's testimony that Verizon seeks to have the Department strike from the record. As requested, Verizon filed its supplement on December 4, 2001 ("VZ Supplement").

II. POSITIONS OF THE PARTIES

A. Verizon

In its Motion to Strike, Verizon argues that portions of AT&T's surrebuttal testimony that address Verizon's provisioning of special access services should be stricken from the record (VZ Motion to Strike at 1).¹ Verizon argues that special access provisioning is being

¹ In its Supplement, Verizon specified that it seeks to have the Department strike the surrebuttal testimony of AT&T's witness, Deborah S. Waldbaum ("Waldbaum") from page 3, line 13 through page 8, line 18, and all of Attachment A (VZ Supplement at 1). The Waldbaum testimony specified in VZ's Supplement discusses not only special access provisioning, but also testimony regarding Verizon's provisioning of unbundled network elements ("UNEs").

dealt with in a separate Department proceeding, D.T.E. 01-34, and is not properly within the scope of this case (id. at 3). Verizon argues that, in addition to the Department's investigation in D.T.E. 01-34, AT&T has petitioned the Federal Communications Commission ("FCC") to investigate Verizon's interstate special access performance (id.). Verizon asserts that if deficiencies in Verizon's special access provisioning are deemed to exist, remedies may be addressed in those proceedings, and therefore there is no need to duplicate those investigations in this case (id.). In the alternative, if the Department does not strike the portions of AT&T's surrebuttal testimony concerning Verizon's special access services, Verizon requests that it be allowed to supplement the record to include limited additional testimony on the issue (id.). Verizon further requests that if the Department is to consider Verizon's special access provisioning in this case, then the Department incorporate by reference the record in D.T.E. 01-34 (id.).

B. AT&T

In its opposition to VZ's Motion to Strike, AT&T argues that the Department should deny VZ's Motion to Strike and should likewise deny Verizon's request to supplement its surrebuttal testimony (AT&T Opposition at 3-5). AT&T asserts that the ability of CLECs to compete effectively in the market significantly depends on Verizon's performance in provisioning special access circuits to CLECs, and therefore this issue is integral to the Department's evaluation of competition in this proceeding (id. at 3). AT&T argues that the fact that Verizon's special access provisioning is being investigated in D.T.E. 01-34, and may be the subject of a FCC proceeding, only confirms AT&T's witness' testimony that a review of

such provisioning is necessary for the Department to determine whether competition as it exists today is sufficient to warrant retail price deregulation (id. at 4). Further, AT&T argues that Verizon's assertion that any possible provisioning problems could be remedied in these other proceedings is not sufficient because it is Verizon's burden to show in this proceeding that sufficient competition exists (id.). AT&T does not oppose Verizon's suggestion to incorporate by reference the record in D.T.E. 01-34, but does oppose any delay in this proceeding in order to do so (id. at 5 n.10). AT&T argues that Verizon has conceded that its wholesale provisioning performance is a relevant consideration to Verizon's claims for deregulation and therefore AT&T's witness' testimony concerning Verizon's failure to present evidence of its performance should remain on the record (id. at 5).

AT&T further argues that Verizon's request in the alternative to supplement the record with additional testimony on its special access provisioning should be denied (id.). AT&T asserts that Verizon has had adequate opportunity to address issues regarding special access provisioning in three rounds of testimony and has chosen not to do so (id. at 6-7). AT&T argues that the Department should not allow Verizon a further opportunity to supplement its case yet again (id. at 7).

III. ANALYSIS AND FINDINGS

In its Motion to Strike the portions of AT&T's Waldbaum surrebuttal that address Verizon's provisioning of special access services, Verizon argues that this issue is not properly within the scope of this case (VZ Motion to Strike at 1). We agree. Verizon's performance for provisioning special access is being investigated in a separate Department proceeding,

D.T.E. 01-34.² In addition, on November 19, 2001, the FCC opened an investigation of whether to adopt performance measurements and standards governing incumbent local exchange carriers' ("ILECs") provision of special access services.³ In the FCC's Special Access NPRM at ¶ 7, the FCC stated that it would address AT&T's claims and requested relief regarding ILECs' alleged performance discrimination against AT&T and other carriers. In light of the Department's investigation in D.T.E. 01-34 and the FCC's investigation in CC Docket No. 01-321, we conclude that, even if Verizon's special access provisioning was within the scope of this proceeding, there would be no reason to conduct yet another investigation into Verizon's performance in provisioning special access services in this proceeding. It would be an unnecessary duplication of efforts already underway at the state and federal level. If we were to conclude that Verizon's special access provisioning was within the scope of this proceeding, the prudent course might be for the Department to delay this proceeding until the ongoing investigations concluded, and incorporate the results within this proceeding.

² Investigation by the Department of Telecommunications and Energy on its own Motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England, Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services, D.T.E. 01-34, Vote and Order to Open Investigation (March 14, 2001) ("Special Access Investigation Order"). In its Special Access Investigation Order at 3, the Department stated that the purpose of its investigation is to determine whether Verizon's special access services are unreasonable, and if so, what steps would be required to improve Verizon's special access services.

³ Performance Measurement and Standards for Interstate Special Access Services, CC Docket No. 01-321, et al., Notice of Proposed Rulemaking, FCC 01-339 (rel. November 19, 2001) ("Special Access NPRM"). In the Special Access NPRM at ¶¶ 13-20, the FCC requested comments on what, if any, measurements, standards, and reporting procedures should apply to ILECs' provisioning of special access services.

However, we agree with Verizon that special access provisioning, and indeed Verizon's provisioning of wholesale facilities in its entirety, is outside the scope of this case. In terms of Verizon's provisioning of facilities that are essential for its retail competitors (facilities that include interconnection, UNEs, resale, switched access, and special access), Verizon either provisions such facilities on a reasonable, non-discriminatory basis, or it does not. In the latter case, the result is either penalties pursuant to the Performance Assurance Plan⁴ or the Consolidated Arbitrations performance standards,⁵ or investigation by the Department or FCC into Verizon's provisioning of specific items such as currently is the case with special access. Either way, the cycle of events, separate and apart from our investigation into competition in this proceeding, is "non-compliance ? investigation/penalty ? correction." Therefore, Verizon is correct in noting that with respect to special access that "any possible negative impact on competition that could result from Verizon MA's provisioning of special access services will be resolved in other proceedings" (VZ Motion to Strike at 3), and therefore we agree that there is no need to duplicate or incorporate our other investigation in this case, as AT&T suggests.⁶

⁴ See Performance Assurance Plan, D.T.E. 99-271 (2000). The Massachusetts Performance Assurance Plan contains measurements, standards and reporting requirements used to evaluate Verizon's wholesale performance.

⁵ See Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 – Phase 3 Order (1996); Phase 3-B Order (1997); Phase 3-C Order (1997); Phase 3-F Order (1999); and Phase 3-G Order (2000) establishing wholesale performance standards and penalties.

⁶ Because the above analysis applies in principle to all wholesale provisioning – not just special access – we will strike the entirety of the testimony referenced in the VZ Supplement (see n.1, above), and not separate out just the testimony regarding special

But we do not have sufficient testimony as to the effect that the above-described cycle of events has on competition. In other words, if one assumes that any current or future provisioning problems follow a cycle of “non-compliance ? investigation/penalty ? correction” as we do in this Interlocutory Order, then what is the effect on competition of a market structure that relies on this corrective mechanism? That is the issue upon which we seek further testimony – not evidence of provisioning compliance or non-compliance. The testimony we seek will be oral and received during the upcoming evidentiary hearings. As we grant Verizon’s Motion to Strike, we do not reach Verizon’s alternative motion to file supplemental surrebuttal on the special access provisioning issue.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: Verizon's Motion to Strike is GRANTED; and it is

FURTHER ORDERED: Parties will comply with all directives contained herein.

By Order of the Department,

_____/s/_____
James Connelly, Chairman

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Paul B. Vasington, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner